Supreme Court, U. S.
FILED
DEC 14 1978
JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-710

ALLEN KLEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner Allen Klein submits this brief in reply to certain contentions contained in the Government's opposing memorandum.

As made clear in our Petition, we do not dispute that a jury may be discharged and a mistrial declared when the facts conclusively demonstrate that the jury is hopelessly deadlocked *and* no alternative procedure to the mistrial exists. Rather, the issue presented here is whether a trial court has unfettered discretion to declare such mistrial, over the defendant's express objection, when the record fails to establish both hopeless deadlock and absence of

alternative procedures. This Court should accept this Petition, which clearly presents this issue, in order to furnish guidance to district courts on this recurring problem, and to prevent irreparable violation of Petitioner's constitutional rights.

We submit the following comments to highlight that the Trial Court here declared the mistrial without a valid basis for concluding that the jury was hopelessly deadlocked and without attempting to use reasonable alternatives:

1. The only basis offered by the Government to support the conclusion that the jury was hopelessly deadlocked is its conclusory reasoning that "[a]fter nearly a week of debate, it is exceedingly *improbable* that additional deliberation * * * would have been fruitful" (Govt. Mem. p. 5; emphasis added). Even assuming the Government's ability to know what was in the jurors' minds, it is axiomatic that what is "improbable" is not "impossible" and thus not "hopeless." The requirement that a jury must be found to be genuinely deadlocked, without possibility of reaching a verdict, was carefully mandated to prevent just what happened here: the deprivation of a defendant's "valued right to have his trial completed by a particular tribunal" [*United States* v. *Jorn*, 400 U.S. 470, 484-85 (1971)], although a verdict from that jury remained possible. Even more to the point, the Government's say-so of "improbability" is conclusively refuted by those cases in which juries, who, after reporting that they were at that time deadlocked, were allowed to continue deliberations for a period longer than the six days here, and then reached a unanimous verdict (see Petition p. 19n).

Particularly here, where three jurors expressly advised the Trial Court that they believed that further deliberations could result in a unanimous verdict, the mere fact that nine disagreed does not establish that a unanimous verdict is impossible. Indeed, the Government itself suggests the flaw in its position when it correctly states that "the statements of any *two* jurors of opposite views that they will never change their minds is sufficient to warrant a mistrial" (Govt. Mem. p. 6n; emphasis in original). But we do not know, and the Trial Court never sought to determine, whether those jurors who were unwilling to change their minds were of the same view, in which case a verdict remained possible.*

2. The Government concedes that Petitioner sought, as an alternative to mistrial, an additional instruction on corroboration—which the jury had requested but had been denied—and a strong *Allen* charge (Govt. Mem. p. 3).** As with the court below, the Government here does not deny the validity or correctness of the additional charges

* The Government asserts (fn. 4) that the views of the three jurors, who thought that a verdict remained possible, concerning the willingness of "their colleagues . . . to reconsider their positions" could not be discerned from the jurors' note, without appropriate inquiry addressed to them. This inability to be certain, from the face of the jury's note, of the jurors' view of the hopelessness of deliberations, applies likewise to the nine jurors who opined that the jury was deadlocked: to paraphrase the Government's footnote, "it is far from clear from the jury's note whether these [nine] jurors were predicting that their colleagues would be [un]willing to reconsider their positions" and, if so, whether those "colleagues" all had the same or contrary view. Without such information, obtainable only by appropriate inquiries which were not made, no one can be certain whether the jury was hopelessly deadlocked.

** The Government's choice of words, immediately preceding its agreement that defendant had made these requests, is frankly puzzling. It makes no sense for the Government to state that "[p]etitioner offered no alternatives directly," and then relate Petitioner's request for corroboration and *Allen* charges.

requested by Petitioner as an alternative to mistrial. The Government's conclusory assertion, without citation, that the Trial Court "adequately considered" them (Govt. Mem. p. 5), cannot excuse the Trial Court's failure to attempt to use these two reasonable alternatives before depriving Petitioner of his "valued right" to have the jury return a verdict.

• • •

The Government asserts (Govt. Mem. p. 5) that the decisions cited in our Petition are distinguishable because in those cases "there was substantial evidence that the jury was not deadlocked or the trial judge took insufficient steps to ascertain the jury's status or to explore possible alternatives before declaring a mistrial." But, as shown above and in our Petition, those are just the facts that exist here. Hence, the decision below cannot be reconciled with the authorities cited in our Petition.

One additional fact here makes it essential that Petitioner's double jeopardy claim be sustained in order to prevent irreparable deprivation of constitutional rights. Petitioner testified at his first trial, produced voluminous personal and financial records and data, and subjected himself to rigorous cross-examination. As a consequence, requiring Petitioner to be tried a second time effectively deprives him in that second trial of his constitutional right against self-incrimination and, contrary to fundamental principles inherent in our criminal law, grants the Government *de facto* pre-trial discovery of the defendant. While we do not here dispute that this may be an unavoidable consequence of a mistrial properly declared, it emphasizes

the need for this Court to enunciate guidelines for trial courts to follow to insure that a jury is genuinely deadlocked and all possible alternatives have been tried before a jury is discharged over the defendant's objection.

Conclusion

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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